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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 8(b)(4)(A), (B) — 2, 7, 8

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 549

DRIVERS AND CHAUFFEURS LOCAL UNION NO. 816, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 21a–24a) is reported at 292 F. 2d 329. The Board's decision and order (P.A. 30a–34a) [1] are reported at 127 NLRB 1059.

[1] "P.A." and "B.A." references are to the Petitioner's and Board's appendices filed with the court below. Occasional references to undisputed portions of the unprinted transcript of the record are designated "Tr." Whenever in a series of references a semicolon appears, references preceding the semicolon are to the Board's findings; succeeding references are to the supporting evidence.

JURISDICTION

The decision of the court of appeals was issued on July 5, 1961, and a decree was entered on August 17, 1961 (Pet. 21a–27a). The petition for certiorari was filed on November 14, 1961.[a] The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's findings, sustained by the court below, that the relationship between a trucking company and an employer who leased trucks from it was that of independent contractor and neutral employer, so that picketing of the latter was "secondary" and thus banned by Section 8(b)(4) (A) and (B) of the National Labor Relations Act.[b]

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act in effect during the events of this case are set forth at p. 3 of the Petition.

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[a] If the decision of the court of appeals be treated as containing the court's judgment (Pet. 21a, 24a), the petition for certiorari was not filed within the 90-day period specified in 28 U.S.C. 2101(e). Although a decree was entered on August 17, 1961 (Pet. 25a–26a), it did not revise the legal rights or obligations, but was a ministerial formalization of the decision of July 5. See *Federal Trade Commission* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206.

[b] The references to Section 8(b)(4) (A) and (B) are to the provisions as they read prior to the 1959 amendments to the Act. The amendments do not affect the disposition of this case.

STATEMENT

A. THE BOARD'S FINDINGS

Montgomery Ward and Company (hereafter called Ward), in addition to other business facilities in New York City, operates a Fashion Pool which serves as a distribution center of women's apparel for Ward's retail outlets throughout the country (P.A. 12a; Tr. 21–23, 28, 92). Pursuant to contract with Ward, Metropolitan Truck Rental Service, a subsidiary of Hertz Corporation (hereafter called Metropolitan), furnished Ward with two trucks and two drivers to transport outbound shipments from the Pool to various merchandise rerouting points throughout the city (P.A. 13a; Tr. 28, 92). Ward had no trucks of its own and has for many years relied on contract carriers for necessary transportation services (P.A. 13a; Tr. 271, 294, 416–418).[4]

The terms of employment under which Metropolitan furnished the two drivers, Wesley and Stern, were governed by a collective bargaining agreement between Local 816 and Motorways, Inc., another subsidiary of Hertz (P.A. 14a; Tr. 327). Under this agreement, Motorways paid the drivers, made all appropriate deductions for withholding taxes and social security, made welfare and pension fund payments, and paid for workmen's compensation (P.A. 14a; B.A. 29). Ward did not authorize the making of

[4] In 1955, Hertz Corporation absorbed and assumed the contract which Rentways, Inc., had maintained with Ward since 1952. Prior to this time, the services had been performed by New York Haulage (P.A. 13a; Tr. 416–418).

this agreement, nor did it in any way participate in its negotiation, nor adopt or ratify its terms (P.A. 19a; B.A. 26–27). Additionally, there is no evidence in the record to show that Ward owned any stock in any of the corporations in the Hertz complex: nor did it exercise any control over their business operations or labor relations (P.A. 19a).

In the contract between Ward and Metropolitan, Ward agreed to pay a flat weekly rate for each "truck with driver" regularly furnished (P.A. 15a–16a; 42a–43a). Metropolitan, for its part, maintained, repaired and operated the vehicles at its own expense, in the Hertz garage; it obtained all necessary permits and licenses, and, with the exception of cargo insurance, sustained all expenses of insurance and indemnity (P.A. 15a–16a; 42a, 45a–47a). The two trucks were painted in accordance with Ward's specifications, carrying its name, colors, and advertising symbols (P.A. 14a, 42a).

The contract provided, in part, that (P.A. 16a; 48a–49a):

> It is understood that this is not an agreement of partnership or employment of Carrier or any of Carrier's employees by Wards, and it is expressly understood and agreed that the equipment and personnel referred to above shall at all times be under the sole and absolute control of Carrier, who shall have the sole right to employment and discharge of personnel.

Accordingly, all personnel, wage, and related administrative records for the two drivers were maintained by Metropolitan-Hertz and neither of the drivers was processed through the customary hiring procedures

maintained by Ward; nor did they at any time fill out the standard Ward's employment form (P.A. 18a; B.A. 29–30). Ward maintained no personnel files for the drivers, did not require them to undergo the physical examination mandatory for all Ward's employees, and did not include them in the Ward's employee pension or group insurance plans (B.A. 18–22).[5]

Both drivers reported at the Hertz garage each morning, punched a Hertz time clock, and picked up their trucks (P.A. 13a; B.A. 29–30). They then drove to the Fashion Pool, where they received routine instructions as to loads and destinations (P.A. 13a–14a; B.A. 31, 33–34). Their work required little or no supervision and they received no instructions as to particular delivery routes (P.A. 14a; B.A. 13, 33–34). After completing their work day, they returned to the Hertz garage and punched out (B.A. 30, 35, 39). In the event of a mechanical breakdown during deliveries, the drivers would call Metropolitan for a replacement truck or a mechanic (B.A. 31–33, 35). Accident reports were filed only with Metropolitan on standard Metropolitan forms (*ibid.*).

On August 31, 1959, Ward, after appropriate notice, cancelled its contract with Metropolitan and entered into a contract with Sidel Truck Leasing Corporation. The contract arrangements between Ward and Sidel were in all material respects substantially identical to those previously existing between Ward and Metropolitan (P.A. 15a–16a).

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[5] Wesley and Stern worked under this system for some 15 and 8 years respectively. Both survived the transfer from Rentways to Hertz, and Wesley also survived the previous transfer from New York Haulage to Rentways.

Upon Ward's cancellation of its contract with Metropolitan, the Hertz dispatcher informed Wesley and Stern of the termination of their employment. Neither of the drivers was processed through any of the customary Ward's discharge procedures (B.A. 22–23, 34, 38–39). On September 1, petitioner's representative Foranzo, accompanied by the two discharged drivers, visited Ebling, Ward's traffic manager at the Fashion Pool (P.A. 16a; B.A. 10–12). Foranzo demanded that the drivers be restored to the payroll. When Ebling refused and replied that the drivers were employees of Hertz and not Ward, Foranzo, accompanied by the drivers, walked out and stated that the "Union would take the necessary action" (P.A. 16a; B.A. 10–12). The following day, the two drivers appeared at the Fashion Pool and commenced picketing, with signs stating that Ward was "unfair" to Local 816. Thereafter, incoming deliveries ceased at the Fashion Pool and, as a result, 90 of the 130 Fashion Pool employees were laid off and business at the Pool ceased (P.A. 17a; B.A. 18).

Meanwhile, on September 1, Lester Connell, secretary-treasurer of petitioner, telephoned Kenneth Sidel and informed him that the operation at the Fashion Pool for which Sidel Truck Leasing Corporation now had a contract was subject to an existing contract, as to the drivers, with Local 816 (P.A. 18a; B.A. 6–7). Connell demanded that the existing contract be continued with respect to the drivers and that they be put back to work the following day (*ibid.*). Sidel, who had already arranged to place on the Ward's contract two drivers from Teamster Local 138, tele-

phoned officials of Local 138 (P.A. 18a; B.A. 8–9). As a result of these conversations, Sidel offered to assume the contract between Local 816 and Metropolitan until its expiration date, August 31, 1960, but thereafter he wished to be free to negotiate with Local 138 (*ibid.*). Connell replied that, at such time as the contract terminated, he and Sidel would negotiate further. Lacking prior agreement on this matter, Sidel refused to assume the Metropolitan-Local 816 contract and the picketing at the Fashion Pool continued until September 19, when it was enjoined under Section 10(l) of the Act, pending the Board's decision.[6]

B. THE BOARD'S CONCLUSIONS AND ORDER

On these facts, the Board concluded that petitioner violated Section 8(b)(4) (A) and (B) of the Act. The Board found that the picketing at Ward's Fashion Pool location had dual purposes: (1) to force Ward to cease doing business with Sidel and to engage a carrier-contractor who would recognize petitioner as the bargaining agent for the drivers supplied under contract; and (2) to force Sidel to recognize petitioner as the representative of the drivers though it was not certified as such. The Board further found that the arrangements between Ward and both trucking companies established an independent contractor relationship rather than one in which Ward became the co-employer of the drivers.

[6] *McLeod* v. *Drivers and Chauffeurs Local Union No. 816 I.B.T.*, 178 F. Supp. 288 (S.D.N.Y.), affirmed, 277 F. 2d 800 (C.A. 2).

Thus, Ward was a neutral employer in petitioner's dispute with the trucking companies and entitled to the protection of Section 8(b)(4) (A) and (B). (Pet. 10a–11a.) The Board ordered petitioner to cease and desist from the unfair labor practices found and to post appropriate notices (Pet. 16a–18a).

C. THE DECISION OF THE COURT OF APPEALS

The court below held, as did the Board, that Ward was a neutral employer within the meaning of Section 8(b)(4) (A) and (B) of the Act and that the picketing was, as a consequence, violative of the Act. The court pointed out (Pet. 23a) that "normally one who hires an independent contractor to perform services will not be considered an employer with respect to the independent contractor's employees * * * even though the independent contractor and its employees are subject to some quantum of control by the party using their services." The Board's order was, therefore, enforced in full.

ARGUMENT

Petitioner's basic contention is that its picketing of Ward, in furtherance of its dispute with the trucking companies over the drivers supplied under contract with Ward, was "primary" and thus outside the ambit of the secondary boycott provisions of the Act, because the arrangement between the companies and Ward was such that Ward became in effect the co-employer of the truck drivers (Pet. 8–13). The Board's finding, affirmed by the court below, that the trucking companies were independent contractors and that Ward was a neutral employer for

purposes of Section 8(b)(4) of the Act presents no issue warranting review by this Court, for it turns on the particular facts of this case. In any event, the evidence summarized in the Statement (pp. 3–8) amply supports the finding that Ward did not lose its neutral status by leasing trucks with drivers from the companies.[7] See *National Labor Relations Board* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675; *UMW* v. *Osborne Mining Co.*, 279 F. 2d 716 (C.A. 6); *National Labor Relations Board* v. *Bangor Bldg. Trades Council*, 278 F. 2d 287 (C.A. 1); *Retail Fruit & Vegetable Clerks Union* v. *National Labor Relations Board*, 249 F. 2d 591 (C.A. 9).

This case is distinguishable from *Local No. 24, International Brotherhood of Teamsters* v. *National Labor Relations Board*, 266 F. 2d 675 (C.A. D.C.), where the lessee of trucking services was held to be an employer of the drivers supplied with the trucks (Pet. 9–13). As the court below observed, there, unlike here, the elements of control by the lessee were so extensive that the operations of the independent contractor and its employees were "completely dominated and controlled" (Pet. 24a).

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[7] The question whether an independent contractor or an employer-employee relationship is established depends essentially on the degree of control over the work and those performing it which is exercised by the person contracting for the services. Under settled principles, Ward's control over the drivers supplied by the trucking companies (see pp. 4–5, *supra*) was not substantial enough to negate an independent contractor relationship. See *United States* v. *Silk*, 331 U.S. 704; *National Labor Relations Board* v. *Steinberg*, 182 F. 2d 850 (C.A. 5); *National Van Lines* v. *National Labor Relations Board*, 273 F. 2d 402 (C.A. 7).

Petitioner's reliance (Pet. 13-16) on the cases holding that an employer loses his neutral status by performing "struck work" (see *Douds* v. *Metropolitan Federation of Architects*, 35 F. Supp. 672 (S.D. N.Y.); *National Labor Relations Board* v. *Business Machine & Office Appliance Mechanics*, 228 F. 2d 553 (C.A. 2), certiorari denied, 351 U.S. 962), is entirely misplaced. The court below correctly noted (Pet. 24a) that the "struck work" doctrine is not applicable to the situation here, for Ward was not performing work which the trucking companies would otherwise have done but for a strike.

We note that the panel of the court below which decided the instant case consisted of Circuit Judges Waterman (who wrote the opinion) and Lumbard, and Court of Claims Judge Madden, sitting by designation. The question whether a Court of Claims Judge may properly be authorized to sit on the Court of Appeals is pending before this Court in *Glidden Co.* v. *Zdanok*, No. 242, this Term, certiorari granted, October 9, 1961, 368 U.S. 814. However, since that question is not presented in the petition in this case, we do not believe the disposition of the petition need be postponed pending the outcome of that case.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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